of this title is serving as trustee in the case;

18 U.S.C. §152 (2) and (6) provide in pertinent part:

Concealment of assets; false oaths and claims; bribery

A person who –

(2) knowingly and fraudulently . . . . makes a false oath . . . . in relation to any case under title 11;

(2) knowingly and fraudulently . . . . . receives, or attempts to obtain any money or property, ... compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11:

shall be fined not more than $5,000, imprisoned not more than five years, or both.

18 U.S.C. § 155 provides in pertinent part:

Whoever, being a party in interest, whether a debtor, creditor, ...or attorney for any such party in interest, in any . . . case under title 11 in any United States court . . .knowingly and fraudulently enters into any agreement, express or implied, with another party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 3075 provides in pertinent part:

Bankruptcy investigations

(a) Any judge . . . . or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, ...has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of witnesses and the offense or offenses believed to have been committed. . . . .

STATEMENT OF THE CASE

Petitioners filed an adversary complaint in the United States Bankruptcy Court against the City of Morro Bay seeking a declaration that the City's violations of 11 U.S.C. § 525 were void and for the court to enforce the statutory prohibitions contained in the statute.

Respondent, City's answer asserted various affirmative defenses, including statute of limitations, res judicata, and collateral estoppel. The res judicata and collateral estoppel affirmative defense was based on the "rejection of the lease. The City's Answer to the complaint admits the allegation in the complaint that they had demanded the surrender of the premises.

The matter was set for trial for March 28, 2003. Prior to trial, the City filed two motions in limine seeking to exclude evidence and arguments (1) as barred by the statute of limitations, and (2) the doctrine of collateral estoppel and/or law of the case.

Petitioners responded to the City's motions and filed their own motion in limine to exclude evidence and

argument based on the City's unclean hands. The motion spelled out in detail the City's violations of Title 18 of the United States Code, including the proof necessary to support each claim.

At the time of trial, the bankruptcy court determined that the statute of limitations had expired and dismissed petitioners' complaint. The docket entry for the hearing stated, "hearing held - judgment for the City of Morro Bay, dismissed as violating statute of limitations."

The court refused to consider petitioners' motion in limine concerning the City's unclean hands.

The City submitted a proposed order that stated, inter alia, that the trial had gone forward on March 28, 2003, and that the court ruled against the plaintiffs, specifically finding that the complaint was barred by the statute of limitations. The proposed order also stated that the court ruled as a separate and additional basis for the judgment, that the complaint was barred by the doctrine of collateral estoppel (Pet. App. 29-32).

Petitioners filed an objection to the proposed order and a Motion for New Trial because the court had failed to consider whether the statute of limitations had been tolled. The court set the motion for hearing on October 7, 2003.

At the hearing on the motion for new trial, the court stated that no evidence had been presented because she had granted the City's motion in limine based on the statute of limitations and therefore there had been no trial.

Petitioners presented their argument concerning the tolling of the statute of limitations and again requested

that the court consider the City's violations of 18 U.S.C. §§ 152(2) and (6), and 155 and requested the court refer the information provided to the United States attorney as required under 18 U.S.C. § 3075. The court refused the petitioners' request. The relevant sections are included in the "statutory provisions involved" (*id.* at p. 4-5).

The City again submitted a proposed order to the court. Petitioners again filed timely objections to the form of the order. Instead of drafting a new order clarifying the ruling, the court lined through the portion of the complaint that stated, ". . .that the complaint was barred by the Statute of Limitations. The court also ruled that the complaint was barred by the doctrine of collateral estoppel." (Pet. App. 33-36). The court wrote in her own handwriting the words, "as set forth on the record." This was written directly above the lined-through portions and initialed in the margin. The court also lined through other portions of the order that are not pertinent to this petition for certiorari (Pet. App. 36).

Petitioners appealed the order to the BAP and also made a motion for sanctions to the BAP based on the City's fraudulent representations in their respondent's brief. The BAP affirmed the bankruptcy court's order, finding that the court had dismissed petitioners' complaint based on the res judicata doctrine of claim preclusion (Pet. App. 5). (Published at 318 B.R. 729.) The BAP also denied petitioners' request for sanctions , "based on the Opinion filed concurrently herewith." (Pet. App. 27-28.)

The Ninth Circuit affirmed the BAP, without oral argument, in an unpublished memorandum (Pet. App. 1-3).

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. *First,* the decision of the court below directly conflicts with the holdings of this Court in *F.C.C. v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003).

Second, the court's application of the doctrine of collateral estoppel to avoid enforcement of a statutory prohibition was an abuse of discretion.

Third, the City has violated not only sections 525 and 362 of the bankruptcy code, but Title 18 U.S.C. §§ 152 and 155 as well.

I. Certiorari Is Warranted Because The Decision Below Fails To Follow The Decision Of This Court In *F.C.C. v. NextWave Personal Communications, Inc.*, 537 U.S. 293.

Though not specifically stated in this Court's decision in *F.C.C. v NextWave* (*id.*), it is apparent that the F.C.C was required to return the license it had taken from NextWave. That this Court determined that the actions of F.C.C. were void, is implicit in the ruling.

This case parallels the F.C.C. case in several respects. The City's assertion that the lease "terminated automatically" when petitioners did not make a timely motion to assume the lease is really no different than the F.C.C's claim that the licenses had "automatically cancelled" when NextWave missed the first payment deadline. The major difference is that in this case the City

had been paid, in full in advance, and held a substantial security deposit.

Another similarity between the cases is that the F.C.C. never denied that if NextWave had made its payments, the company could have retained its licenses. In this case the City repeatedly stated that if petitioners had made a timely motion to assume, the City would not have taken the actions it took. When asked by a judge of the bankruptcy appellate panel if the City had *any other reason* for taking the lease, the City attorney answered, "not that I am aware of, your Honor."

The bankruptcy court in *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 270 (Bkrtcy S.D.N.Y. 2000) found that, "[i]t is well recognized that [t]he prohibition against discrimination based upon the filing of a bankruptcy necessarily extends to the automatic or likely consequences of such a filing." *4 Collier on Bankruptcy* ¶ 525.02[1]. *Collier* also holds that §525 applies even if the bankruptcy has the effect of causing rejection of a preexisting lease (at 525.02[5]) or upon the automatic stay provided by a bankruptcy filing (at 525.02[7]).

In *Stoltz v. Brattleboro Housing Authority (In re Stoltz*, 315 F.3d 80 (2nd Cir. 2003) the Court of Appeals for the Second Circuit discussed the purpose and interpretation of § 525 at length. The court held that the specific language of § 525(a) prevailed over any conflict with § 365, because § 525(a) is more specific, applying only to a small subset of unexpired lease, and because that result promotes the overarching fresh start goals of the Bankruptcy Code.

It is undeniable that the City is a governmental unit that not only *revoked* the lease of the debtors, but has steadfastly refused to *renew* the debtors right to the lease, even after demanding and accepting $155,000.00 of *estate funds* to treat the lease as if it had not been terminated by the deemed rejection in the bankruptcy proceeding of James and Margie George.

The actions by the City are explicitly prohibited by § 525 and this Court should not permit a lower court to effectively overrule this Court on the applicability of that statute to the undisputed facts.

2. The Bankruptcy Court's Application Of Collateral Estoppel To Avoid Enforcement Of A Statutory Prohibition Was An Abuse of Discretion.

The order signed by the bankruptcy court stated that the complaint was barred by the Statute of Limitations and, as a separate and additional basis, the complaint was barred by the doctrine of *collateral estoppel* (Pet. App. 31-32). The BAP went to great lengths to explain the difference between "res judicata" (*claim* preclusion) and "collateral estoppel" (*issue* preclusion). They begin by stating that rulings regarding the availability of res judicata doctrines, including claim preclusion are reviewed de novo as mixed questions of law and fact in which legal questions predominate. Once they determine that the doctrines are available to be applied, the *actual decision* to apply them is left to the *trial court's discretion.*

The BAP goes on to state that *issue* preclusion (i.e. collateral estoppel) bars relitigation only of issues that have been *actually litigated* while *claim* preclusion (res Judicata) may bar a cause of action that has never been

litigated.

The District of Columbia Circuit Court of Appeals case that was affirmed by this Court (*NextWave Personal Communications, Inc. v. F.C.C.*, 254 F.3d 130 (D.C. Cir. 2001) dealt with the subject of issue preclusion and claim preclusion. They found that for *issue* preclusion to apply the issue must have been actually and necessarily determined by a court of competent jurisdiction in the first trial. "If the 'basis' of a prior decision is 'unclear, and thus uncertain whether the issue was actually and necessarily decided in [the prior] litigation, then litigation of the issue is not precluded.'"

In this case, every decision of the bankruptcy court between these parties has been based on the deemed rejection of the lease under § 365(d)(4). The Ninth Circuit has held that a motion to assume or reject is a summary proceeding and not on the merits. *G.I. Industries, Inc. v. Bendor Corp. (In re G.I. Industries, Inc.* 204 F.3d 1276, 1282 (9th Cir. 2000) citing *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion)*, 4 F.3d 1095, 1099 (2nd Cir. 1993). The *Orion* court found that a decision to assume will receive no collateral estoppel effect.

The BAP cites the Restatement (Second) of Judgments § 26 for the specific exceptions to claim splitting. Subsection (1) of § 26 states that "when any of the following circumstances exist, the general rule of § 24 does not apply to extinguish the claim, and all or part of the claim subsist as possible basis for a second action by the plaintiff against the defendant: (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme that the plaintiff should be

permitted to split his claim" (Pet. App. 18-19).

There can be no doubt that the judgment in the first action (the surrender order) has been plainly inconsistent with the fair and equitable implementation of not only the bankruptcy statutes, but the constitution as well.

The BAP further found that "an attempt to assert the § 525 theory as a counterclaim in the premises surrender litigation would have been procedurally out of order."

The BAP states that the affirmative relief action by the Georges had ended with all federal counts dismissed with prejudice. The complaint had seven federal causes of action. If the BAP had examined the record as to the facts concerning that adversary proceeding they would have found that the court had originally dismissed all federal claims except the RICO claim without leave to amend. The dismissal for failure to state a claim was based on the prior litigation in the surrender order. The § 1983 claim was dismissed on the statute of limitations ground which is not on the merits.

All of the foregoing seems irrelevant, however, when considering this Court's decision in *F.C.C. v. NextWave* (supra.) The case in the lower court (D.C. Circuit), which this Court affirmed, dealt extensively with the res judicata issue, and yet there is no mention of res judicata in this Court's decision. Given the absence of any discussion of the res judicata issue, it seems reasonable to assume that a governmental entity's violation of § 525 could not be avoided on the grounds of res judicata.

Congress saw fit to enact legislation that specifically Prohibits the actions taken by the City. The court's refusal

to enforce the provisions of § 525 amounts to the court's usurpation of congressional power and denies petitioners the equal protection of that law.

There is no denying that the City never obtained relief from the automatic stay to take the lease. In the Ninth Circuit actions taken in violation of the automatic stay are void. *In re Schwartz,* 954 F.2d 569 (9th Cir. 1992). The court in *Schwartz* found that given the fundamental purpose of the automatic stay and broad debtor protections of the Code, congress did not intend to burden a bankrupt debtor with an obligation to fight off unlawful claims. (*id.* at 571-72).

This same reasoning should apply to § 525(a). The D.C. Circuit court in *F.C.C. v. NextWave* (supra.) held that § 525 offered more permanent relief for the debtor (at 135) and that § 1123 gives the debtor the power to cure defaults.

The BAP found that their conclusions made it unnecessary to address the court's alternative ruling that the action was time barred (Pet. App. 26). That ignores the fact that the motion for new trial raised the issue of the tolling of the statute, citing *Young v. U.S.,* 122 S. Ct. 1036, 1040 (2002) wherein this Court reiterated that it is hornbook law that limitations periods are customarily subject to equitable tolling and *Addison v. California,* 21 Cal. 3d 313, 317 (1978) which ruled that under California law, equitable tolling relieves plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably, and in good faith, pursued to lessen the extent of his injuries or damages.

The Ninth Circuit has held that an exercise of discretion based on an erroneous interpretation of the

law can be freely overturned. *In re Arden,* 176 F.3d 1226, 1228 (9th Cir. 1999). Based on the foregoing, the bankruptcy court's order should be overturned.

3. The City Has Violated Not Only Sections 525 And 362 Of The Bankruptcy Code, But Title 18 U.S.C. §§ 152 and 155 As Well.

A. Background Of Events In The Bankruptcy Case.

Petitioners, James F. George, III, and Margie R. George entered into a lease with the City of Morro Bay in 1987. The lease was for three ground and water Tidelands Trust lease sites. The stated term of the lease was for thirty (30) years and contained a provision for an additional twenty (20) years under a first right of refusal. The lease commenced on July 1, 1987 and ends on June 30, 2017 or on June 30, 2037 if the first right of refusal were asserted.

Petitioners, with the help of their grown children, constructed improvements on the lease sites as required by the lease. Petitioners spent in excess of $500,000.00 developing the lease sites and repairing the seawall, which sum does not include their thousands of hours of labor. All improvements were constructed at no cost or expense to the City. Petitioners' children assisted them with labor and financial support in building the improvements on the lease sites. The lease provides that petitioners are the owner of the improvements constructed on the lease sites. At the time petitioners filed their Chapter 11, the lease was appraised in for $875,000.00, not including the value of the businesses operated thereon.

The Georges had to maintain the improvements and the seawall at their own expense and to build and maintain public restroom. The City incurred no expense with either the building or the maintenance of the improvements. The City had no executory obligations to the Georges in connection with the lease.

In 1993, petitioners assigned a forty percent (40 %) interest in the lease to their children in recognition of their assistance in building the improvements and for their help in establishing the businesses thereon.

On June 7, 1994 petitioners filed a Chapter 11 reorganization petition and operated the lease sites and Their businesses thereon as debtors in possession.

Petitioners, as debtors' in possession did not file a formal motion to assume the lease within sixty days of the order for relief pursuant to §365(d)(4). They believed that in Chapter 11 reorganization proceedings, the lease could be assumed in their Plan of Reorganization. (See Rule 6006(a), page 6 supra.)

On September 30, 1994 the City Manager, without relief from the automatic stay or any order from any court, had the Harbor Director deliver a letter to the Georges at the lease sites demanding immediate surrender of the property to the City. The letter stated that the demand was being made pursuant to § 365(d)(4).

Petitioners did not surrender the property, and on November 1, 1994 filed their Reorganization Plan. The plan specifically provided for the assumption of the lease.

At the time the City demanded the surrender of the property the City had not been injured in any way by the

petitioners' failure to file a formal motion to assume the lease. Petitioners were at all times in full compliance with all the terms and conditions of the lease. The rent was fully paid in advance and the City held a substantial security deposit.

On November 15, 1994 the City filed a Motion for Surrender Order of Non-Residential Real Property with the bankruptcy court.

The Georges filed a motion to assume the unexpired lease "if applicable". The bankruptcy court consolidated the hearings on the motions and granted the City's motion and denied the Georges' motion to assume the lease.

The Georges appealed the order to the district court and the district court remanded to the bankruptcy court to determine if the City had "evidenced an intent to treat the lease as continuing rather than terminated."

After the district court remand, the City entered into a "Settlement Agreement" with the Georges' lender whereby the bank would pay the City $155,000.00 to treat the lease "as if the lease were not terminated by the deemed rejection in the bankruptcy proceedings of James F. George, III and Margie R. George."

The bank paid the City $155,000.00 from the estate's equity in the lease. Attached to the check was the statement, "[s]ettlement agreement costs for *reinstatement of lease* (emphasis added) .The bank added the $155,000.00 to the debtors' loan balance. The bank eventually added in excess of $222,000.00 to the loan balance for expenses directly related to the debtors' bankruptcy, without ever obtaining any order from any court allowing such fees. All of these actions are clearly prohibited by 18 U.S.C. § 152(2) and (6), and §155. In addition the City also

seized rent from the Georges' subtenants in excess of $35,000.00 which belonged to the bankruptcy estate.

Thereafter, without informing the bankruptcy court of the settlement agreement with the Georges' lender, the City renewed their request for a surrender order. The court granted their motion and entered an order drafted by the City that stated that anyone holding under or through them were required to immediately surrender the property.

The City obtained a writ of possession from the clerk of the bankruptcy court. The U.S. Marshall's office refused to evict Georges without the City having relief from the automatic stay. Instead of obtaining relief from the automatic stay, the City had the sheriff's office evict all the Georges from the property. The City seized the buildings and equipment that was the property of the estate.

At no time did the City ever seek relief from the automatic stay to take the actions against the Georges. Section 541 specifically provides that upon filing a case under Title 11, all property of the debtor. Only nonresidential leases that have terminated at the expiration of the stated term are excluded from the estate.(§ 541(b)(2). Under § 362(b)(10) only lessors of nonresidential property that have terminated at the expiration of the stated term are exempted from the automatic stay.

B. Statutory Violations.

In doing the actions described the City violated not only the spirit and purpose of the bankruptcy code, but also express statutory prohibitions as well. Congress

considered violations of 18 U.S.C. §152 be egregious enough to impose imprisonment for up to five years for the violations thereof.

The City's actions have cheated all other creditors out of their fair share of the debtors' estate. Even secured creditors were deprived of their security.

CONCLUSION

In this case the most fundamental policies underlying the Bankruptcy Code: the recognized policies of preserving going concerns and maximizing property available to satisfy creditors, have been defeated by the failure of the City to abide by the laws enacted by Congress.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

James F. George, III
Margie R. George
P.O. Box 424
Atascadero, CA 93423-0424
(805) 461-9601

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: JAMES F. GEORGE, III, In re: MARGIE R. GEORGE, Debtors, --- JAMES F. GEORGE, III; MARGIE R. GEORGE, Appellants, v. City of Morro Bay Appellee.	No. 05-55081 BAP No. CC 04-01319-KPaB **MEMORANDUM*** (Filed Aug.10, 2005)

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Brandt, Pappas, and Klein, Bankruptcy Judges

Submitted June 15, 2005**

Before: **SKOPIL, FARRIS,** and **T.G. NELSON,**
Circuit Judges.

James and Margie George ("Georges") appeal pro se a decision by the Bankruptcy Appellate Panel ("BAP") affirming a bankruptcy court's dismissal of their action against the City of Morro Bay ("City"). The BAP ruled the Georges' action was barred by claim preclusion. See George v. City of Morro Bay, 318 B.R. 729, 738-39 (BAP 2004). We affirm.

DISCUSSION

Claim preclusion prevents the relitigation of claims previously tried and decided. Littlejohn v. United States, 321 F.3d 915, 919-20 (9th Cir. 2003). It also bars claims that could have been asserted in a previous action between the same parties in the same cause of action, even if such claims were not raised. Id. at 920. The record indicates the Georges have litigated at least twice with the City regarding the surrender of their lease under 11 U.S.C. §365 (d)(4). See George v. City of Morro Bay, 177 F.3d 885 (9th Cir. 1999) (George I); George v. Morro Bay, 322 F.3d 586 (9th Cir. 2003) (George II). We agree with the BAP that the Georges' new theory – that surrender of their lease violated 11 U.S.C. §525 – could have been raised in a prior proceeding. We do not agree with the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Georges that the bankruptcy court did not rely on claim preclusion or that the City should be estopped from asserting the defense.

Finally, we address the City's request that we impose sanctions upon the Georges for bringing a frivolous appeal. There is no question we are empowered to do so. See Ingle v. Circuit City, 408 F.3d 592, 595-96 (9th Cir. 2005) (awarding double costs and attorneys fees). Indeed, we previously imposed sanctions in George II, 322 F.3d at 591-92. Although the Georges' arguments in this appeal are without merit, we decline to impose sanctions. See Grimes v. Commissioner, 806 F.2d 1451, 1454 (9th Cir. 1986) (noting "an appeal that lacks merit is not always frivolous"); see also Resolution Trust v. Keating, 186 F.3d 1110, 1116 (9th Cir. 1999) (noting the "difficult question" of determining when claim preclusion applies).

AFFIRMED.

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re:	)	BAP No.
	)	CC-04-1319-KPaB
JAMES F. GEORGE, III,	)	
and MARGIE R. GEORGE,	)	Bk. No.
	)	ND 94-12409 RR
Debtors.	)	
	)	Adv. No.
	)	ND 02–1228-RR
JAMES F. GEORGE, III;	)	
MARGIE R. GEORGE,	)	**OPINION**
	)	
Appellants,	)	(Filed Dec 9, 2004)
	)	
v.	)	
	)	
CITY OF MORRO BAY,	)	
	)	
Appellee.	)	
	)	

Argued and Submitted on November 17, 2004
at Pasadena, California

Filed - December 9, 2004

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS* and BRANDT, Bankruptcy Judges

KLEIN, Bankruptcy Judge:

This is an appeal from a judgment based on the res judicata doctrine of claim preclusion which the court invoked to refuse to consider a new theory regarding a transaction that the parties previously had litigated to finality. Concluding that the General Rule of Bar and the General Rule Concerning Splitting, as stated in Restatement (Second) Of Judgments §§ 19 and 24, combine to warrant imposition of claim preclusion, we AFFIRM.

FACTS

Appellants, James and Margie George, who in 1987 had leased nonresidential real property for thirty years from appellee, the City of Morro Bay, filed a chapter 11 case (later converted to chapter 7) in June 1994.

The Georges and the City went to war with each other in September 1994 when the City made a motion for surrender of the leasehold premises

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* Hon. Jim D. Pappas, Bankruptcy Judge for the District of Idaho, sitting by designation.

pursuant to 11 U.S.C. § 365(d)(4), sixty days having elapsed without a motion to assume or reject the lease.

The Georges belatedly sought to assume the lease, contending that the City had waived its § 365(d)(4) rights when it accepted rent post-petition.

The bankruptcy court ruled that the City was entitled to return of the premises regardless of whether rent was current.

Since then, convinced that they were cheated out of their thirty-year lease, the Georges have waged the war on multiple fronts.

The Georges' campaign to retain possession of the premises lasted until the U.S. Supreme Court denied certiorari in 2000. The details were chronicled by the Ninth Circuit in George v. City of Morro Bay (In re George), 177 F.3d 885, 886-87 (9th Cir. 1999), cert. denied, 528 U.S. 1135 (2000 ("George I").

Meanwhile, the Georges counterattacked on a second front in March 1996, commencing an adversary proceeding for affirmative relief against the City and others, including the bank that took over the lease. The complaint alleged sixteen federal and state counts arising from the leasehold dispute, including theories under 42 U.S.C.1983, the Fifth Amendment, and RICO.

After seven years of convoluted skirmishing,

the affirmative relief campaign ended with all federal counts dismissed with prejudice and the state counts dismissed without prejudice. The details appear in George v. City of Morro Bay (In re George). 322 F.3d 586, 588-91 ("George II").[1]

In November 2002, the anti-discrimination provisions of 11 U.S.C § 525 came to the Georges' attention.[2] They filed a complaint seeking a declaration that "termination of the Plaintiffs' lease was void and a violation of" § 525, together with "such other relief as is proper and just."

The City's answer asserted various affirmative defenses, including statute of limitations, "res judicata" (claim preclusion), and "collateral estoppel" (issue preclusion).

At the time of trial, the bankruptcy court ruled

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[1] Besides George I and George II, there are two unpublished Ninth Circuit decisions: 1999 WL 387070 and 387082 (9th Cir. 1999).

[2] 11 U.S.C. § 525(a) provides, in part:

> . . . . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a person . . . solely because such [person is] a debtor under this title . . . .

11 U.S.C. § 525(a).

that the complaint was time-barred and barred by the rules of res judicata.

After unsuccessful post-trial motions, this appeal ensued.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUE

Whether the "General Rule of Bar" and the "General Rule Concerning Splitting' Justified imposing claim preclusion to reject a new legal theory based on previously-litigated facts.

STANDARD OF REVIEW

We review rulings regarding the availability of res judicata doctrines, including claim preclusion, de novo as mixed questions of law and fact in which legal questions predominate. Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Alary Corp. v. Sims (In re Assoc'd Vintage Group, Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002). Once we determine that the doctrines are available to be applied, the actual decision to apply them is left to the trial court's discretion. Robi, 838 F2d at 321.

DISCUSSION

This appeal turns on whether either of the two bankruptcy court judgments trigger the res jusicata doctrines of claim and issue preclusion, which apply in bankruptcy. Brown v. Felsen, 442 U.S. 127, 134-39 (1979); Paine v. Griffin (In re Paine), 283 BR 33, 39 (9th Cir. BAP 2002); Alary Corp., 283 B.R. at 554-55.

The res judicata doctrines regarding judgments of federal courts are a matter of federal common law. W. Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992); Robi 838 F.2d at 322.

The Supreme Court treats the Restatement (Second) Of Judgments ("Restatement") as an authoritative statement of federal res judicata doctrines and has applied the Restatement's substitution of the terms "claim preclusion" and "issue preclusion" for "res judicata" and "collateral estoppel." E.g., New Hampshire v. Maine, 532 U.S. 742, 748 (2001) ("res judicata doctrines commonly termed claim and issue preclusion"; Baker v. Gen. Motors Corp., 522 U.S. 222, 233 n. 5 (1998); Migra v. Warren City Sch. Dist. Bd. of Edu., 465 U.S. 75, 77 n.1 (1984); Hiser v. Franklin, 94 F.3d 1287, 1290 (9th Cir. 1996); Robi, 838 F.2d at 321-22; 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4402 (2d ed. 2003).

I

Issue preclusion bars relitigation only of issues that have been actually litigated, while the broader brush of claim preclusion may also bar a cause of action that never has been litigated. Alary Corp., 283 B.R. at 555. Since there has been no actual litigation of the § 525 theory, this is purely a case of intramural (i.e. within the federal courts[3] claim preclusion.

The Georges litigated the question of validity of the premises surrender to finality. They also separately litigated to finality an amalgam of theories for

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[3] All federal judgments, for conflict of law purposes, are treated as if they were the judgments of the courts of one state. Robi, 838 F.2d at 322. The Restatement explains:

> This Section, like the whole of the present Restatement, is concerned mainly with the res judicata effects of a judgment upon later actions in the courts of the same state. Effects in the courts of a sister state are dealt with in Restatement, Second, Conflict of Laws §§ 93-121. Attention is invited particularly to the discussion of the problem of merger in interstate situations, summarized herein at § 18, Comment d.

RESTATEMENT (SECOND) OF JUDGMENTS § 17, footnote 1.

affirmative relief arising out of the circumstances of the premises surrender dispute.

In each instance, finality occurred when the bankruptcy court entered judgment disposing of all claims. Fed. R. Civ. P. 54(b), incorporated by Fed. R. Bankr. P. 7054 & 9014; United States ex rel. Barajas v. Northrop Corp., 147 F.3d 905, 909 (9th Cir. 1998) ("Barajas"); RESTATEMENT (SECOND) OF JUDGMENTS § 14 (1980).[4]

Although the pendency of appeals did not affect finality, the ultimate affirmances in George I and George II added a dimension to the finality of the bankruptcy court's judgments.

After the litigations regarding premises surrender and affirmative relief were final, the Georges discovered the anti-discrimination provision of Bankruptcy Code § 525(a) and commenced a new adversary proceeding seeking § 525 relief.

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[4] Finality is determined as follows:

> § 14. Effective Date of Final Judgment
>
> For purposes of res judicata, the effective date of a final judgment is the date of its rendition, without regard to the date of the commencement of the action in which it is to be given effect.

RESTATEMENT (SECOND) OF JUDGMENTS § 14.

The City's answer to the § 525 complaint pleaded a number of affirmative defenses, including (using the obsolete terms res judicata and collateral estoppel) claim and issue preclusion. The court relied on preclusion as a basis for denying relief.

We need not delve into the vagaries of § 525, except to note that § 525 has been the basis for affirmative relief that might pertain if the Georges' cause had merit. See 4 COLLIER ON BANKRUPTCY (ALAN RESNICK & HENRY SOMMERS EDS.) ¶ 525.06 (15th ed. rev. 2003).

What matters is that, assuming (without deciding) the new theory had factual and legal merit and could trump § 365(d)(4), the § 525 issue could have been asserted defensively in the premises surrender litigation and could have been asserted offensively as an additional theory in the affirmative relief litigation, both of which resulted in valid and final judgments.

III

Claim preclusion is the consequence of applying the General Rules of Merger and of Bar and the General Rule Concerning Splitting (and their exceptions) to a valid and final personal judgment. RESTATEMENT (SECOND) OF JUDGMENTS §17.[5]

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[5] The foundational rule is:

(continued...)

The General Rule of Merger contemplates that a judgment in favor of plaintiff extinguishes the entire claim, which merges into the judgment. Future actions may be maintained "on the judgment." California v. Taxel (In re Del Mission, ltd.), 98 F.3d 1147, 1150-51 (9th Cir. 1996).

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[5](...continued)
§17. Effects of Former Adjudication - General Rules

A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment (See § 18);

(2) If the judgment is in favor of the defendant, the claim is extinguished and the judgment bars subsequent action on that claim. (see § 19);

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment (see § 27).

These general rules are subject to exceptions: as to Subsections (1) and (2), see §§ 20 and 26; as to Subsection (3), see § 28. [Cross-reference to Restatement (Second), Conflict of Laws omitted.]

RESTATEMENT (SECOND) OF JUDGMENTS § 17

RESTATEMENT (SECOND) OF JUDGMENTS § 18.[6]

Under the General Rule of Bar, a judgment in favor of a defendant ordinarily bars the plaintiff from maintaining another action on the same claim. Gilbert v. Ben-Asher, 900 F.2d 1407, 1410-11 (9th Cir. 1990); RESTATEMENT (SECOND) OF JUDGMENTS §§ 19-20.[7]

---

[6] The General Rule of Merger is:

§ 18. Judgment for Plaintiff - The General Rule of Merger

> When a valid and final personal judgment is rendered in favor of the plaintiff:
>
> (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof. although he may be able to maintain an action upon the judgment: and
>
> (2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did not interpose in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 18.

[7] The General Rule of Bar is

§ 19. Judgment for Defendant - The General Rule of Bar

(continued...)

What is barred by claim preclusion is another

---

[7](...continued)
A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

RESTATEMENT (SECOND) OF JUDGMENTS § 19.

The exceptions to the General Rule of Bar are:

> § 20. Judgment for Defendant - Exceptions to the General Rule of Bar
>
> (1) A personal judgment for the defendant, although valid and final, does not bar another action on the same claim"
>
> (a) When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties; or
>
> (b) When the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be non-suited (or that the action be otherwise dismissed) without prejudice; or
>
> (c) When by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made.

RESTATEMENT (SECOND) OF JUDGMENTS § 20.

action on the same "claim," which is a Restatement term of art with a different meaning than the bankruptcy concept of a "claim." Compare RESTATEMENT (SECOND) OF JUDGMENTS § 24 ("Dimensions of 'Claim'"), with 11 U.S.C. § 101(5) (defining "claim").

What constitutes the same "claim" for purposes of claim preclusion is determined under the so-called "transactional test" in the General Rule Concerning Splitting. This test focuses on the transactional nucleus of operative facts and include all rights to remedies with respect to all or any part of the "transaction," determined pragmatically, out of which the action arose, so long as they could conveniently be tried together. W. Sys., Inc., 958 F.2d at 871; RESTATEMENT (SECOND) OF JUDGMENTS § 24.[8]

---

[8]The boundaries of a "claim" are established as follows:

> § 24. Dimensions of "Claim" for purposes of Merger or Bar - General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the claim arose.

(continued...)

Legal theories and remedies not asserted are extinguished. Lindsay v. Beneficial Reins. Co. (In re Lindsay), 59 F.3d 942, 952 (9th Cir. 1995; RESTATEMENT (SECOND) OF JUDGMENTS § 25.[9]

The listed exceptions to the General Rule

---

[8](...continued)

(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

RESTATEMENT (SECOND) OF JUDGMENT § 24.

[9] This consequence follows from the exemplification:

> § 25. Exemplification of General Rule Concerning Splitting
>
> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
> (1) To present evidence or grounds or theories of the case not presented in the first action, or
> (2) To seek remedies or forms of relief not demanded in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 25.

Concerning Splitting, however, import a measure of latitude as to where to draw the pragmatic line. These include an agreement of the parties to split a claim, express authorization of splitting by the court in the first action, and limitations on court's authority or jurisdiction in the first action to entertain the full claim. California v. Randtron, 284 F.3d 969, 975 (9th Cir. 2002); Barajas, 147 F.3d at 911; RESTATEMENT (SECOND) OF JUDGMENTS § 26.[10]

---

[10] The specified exceptions are:

§ 26. Exceptions to the General Rule Concerning Splitting

(1) When any of the following circumstances exist, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsist as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or

(b) The Court in the first action has expressly reserved the plaintiff's right to maintain the second action: or

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the court or restrictions on their authority to entertain multiple theories or demands

(continued...)

Finally, the res judicata doctrines are neither mandatory, nor jurisdictional. Claim and issue

---

[10](...continued)
for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or

(d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or

(e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or

(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

(2) If any case described in (f) of Subsection (1), the plaintiff is required to follow the procedure set forth in §§ 78-82.

RESTATEMENT (SECOND) OF JUDGMENTS § 26.

preclusion must be raised affirmatively and, if not raised, may be treated as waived. Thus, a second judgment trumps an earlier inconsistent judgment. Robi, 838 F.2d at 327-28; Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1529-30 (9th Cir. 1985); RESTATEMENT (SECOND) OF JUDGMENTS § 15.[11] When asserted defensively, preclusion must be pled as an affirmative defense. Fed. R. Civ. P. 8(c).

As an affirmative matter, the proponent of preclusion has both the burden of persuasion and the correlative risk of non-persuasion. Educ. Credit Mgmt. Corp. v. Repp (In re Repp). 307 B.R. 144, 148 n.3 (9th Cir. BAP 2004).

III

Applying claim preclusion rules to this case requires consideration of the premises surrender litigation against the Georges and of the affirmative

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[11] Waiver is implicit in the inconsistent judgment rule:

> § 15. Inconsistent Judgments
>
> When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata.

RESTATEMENT (SECOND) OF JUDGMENTS § 15.

relief litigation they prosecuted.

A

In the premises surrender litigation, the City, as movant, was in the role of plaintiff, obtaining a judgment in its favor.

Although the Georges' Newfound § 525 theory arguably could have been asserted as a defense to the City's motion to compel surrender of the premises, several reasons militate against basing claim preclusion on such an omission.[12]

First, although a defendant, in an action on an earlier judgment, cannot rely on defenses that might have been interposed in the first action, the present matter does not involve an action on the premises surrender judgment. RESTATEMENT (SECOND) OF JUDGMENTS § 18(2). Rather, it is a separate action by the defendants, who are not now asserting the matter defensively.

Nor does the failure to have asserted the § 525 theory as a counterclaim in the premises surrender litigation justify preclusion. Int'l. Ambassador Programs, Inc. v. Archexpo., 68 F.3d 337, 340-41 (9th Cir. 1995); RESTATEMENT (SECOND) OF

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[12] We intimate no view about whether § 525 actually constitutes a defense to surrender under § 365(d)(4).

JUDGMENTS § 22.[13]

The issues are not mirror images. The matter of surrender of premises, which was the issue in the contested matter, is conceptually distinct from the integrity of the lease termination that is the focus of the § 525 theory.

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[13] The Restatement's counterclaim rule is:

§ 22. Effect of Failure to Interpose Counterclaim

(1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).

(2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:

(a) The counterclaim is required to be interposed by a compulsory countercalim statute or rule of court, or

(b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

RESTATEMENT (SECOND) OF JUDGMENTS § 22.

That litigation was brought as a "contested matter" governed by Federal Rule of Bankruptcy Procedure 9014, which makes many of the adversary proceeding rules applicable in contested matters, but not the counterclaim rules. Compare Fed. R. Bankr. P. 7013, incorporating Fed. R. Civ. P. 13, with Fed. R. Bankr. P. 9014.

Since an attempt to assert the § 525 theory as a counterclaim in the premises surrender litigation would have been procedurally out Of order, Restatement § 22 does not apply. The precondition that the defendant "may" interpose the counterclaim is not satisfied. RESTATEMENT (SECOND) OF JUDGMENTS § 22(1).

Similarly, the restriction on counterclaims in Rule 9014 contested matters would also implicate two of the exceptions to the General Rule Concerning Splitting: (1) Restriction on the court's authority to entertain the counterclaim; and (2) The sense of the statutory rules scheme that the claim be permitted to be split. RESTATEMENT (SECOND) Of JUDGMENTS § 26(1) (c)-(d).

Thus, the Georges' omission to have raised the § 525 theory in the premises surrender litigation does not support preclusion.

B

The Georges' Omission of the § 525 theory from their affirmative relief litigation against the

City, which asserted sixteen federal and state counts, which ended with the judgment in favor of the City and all federal counts dismissed with prejudice, is another matter.

Under the General Rule of Bar, the valid and final judgment in favor of the City bars another action by the Georges on the same "claim." RESTATEMENT (SECOND) OF JUDGMENTS § 19.

Since all federal counts were dismissed with prejudice, no exception to the General Rule of Bar applies. RESTATEMENT (SECOND) OF JUDGMENTS § 20.

The dispositive question, then, is whether the § 525 theory was part of the "claim" that was extinguished when the federal counts were dismissed with prejudice. That requires applying the transactional test made applicable by the General Rule Concerning Splitting. RESTATEMENT (SECOND) OF JUDGMENTS § 24.

The bankruptcy court ruled that the newfound § 525 theory arose out of the same nucleus of facts as the prior action.[14] We agree. The

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[14] The court's pertinent findings were:

> You're bringing a collateral attack on a prior determination, [not] only in this case - of this court, but the District Court, the [Bankruptcy]

(continued...)

operative facts are identical; the § 525 theory formed a convenient trial unit with the other federal counts in the adversary proceeding; and the expectations created by the rules of procedure all support the conclusion that the facts supporting the § 525 theory are, under the General Rule Concerning Splitting, part of the "transaction" That was previously litigated and, hence, part of the same "Claim" For purposed of the General Rule of Bar.

This analysis is confirmed by the fact that a new theory of the case is listed in the Restatement as a paradigm example of what is extinguished under the doctrine of claim preclusion. RESTATEMENT (SECOND) OF JUDGMENTS § 25(1).

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[14](...continued)
Appellate Panel, and the Ninth Circuit.

> We have been through this lease rejection, lease termination, and property surrender in the motion brought originally by the City [, and] in the adversary proceeding that you filed against the City and others, and now another third proceeding.
>
> This time you are bringing an action against the City for the very same set of circumstances. You're just trying a different legal theory. No.

Tr. of proceedings, March 28, 2003, at p. 29.

In short, the Georges' newfound § 525 theory is part of the "claim" that was extinguished under the General Rule of Bar, as determined by applying the transactional test prescribed by the General Rule Concerning Splitting.[15] Hence, claim preclusion was available to be imposed; we cannot say that the bankruptcy court abused its discretion in doing so.

CONCLUSION

The bankruptcy court correctly ruled that claim preclusion was available as a defense and did not abuse its discretion in applying it and dismissing the adversary proceeding. AFFIRMED.

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[15] Our conclusion makes it unnecessary to review the court's alternative ruling that the action was time barred.

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re:	)	BAP No.
	)	CC-04-1319-KPaB
JAMES F. GEORGE, III,	)	
and MARGIE R. GEORGE,	)	Bk. No.
	)	ND 94-12409- RR
Debtors.	)	
	)	Adv. No.
	)	ND 02–1228-RR
JAMES F. GEORGE, III;	)	
MARGIE R. GEORGE,	)	**ORDER DENYING**
	)	**SANCTIONS**
Appellants,	)	**MOTION**
	)	
v.	)	(Filed Dec. 9, 2004)
	)	
CITY OF MORRO BAY,	)	
	)	
Appellee.	)	
	)	

Before: KLEIN, PAPPAS[1] and BRANDT, Bankruptcy Judges

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[1] Hon. Jim D. Pappas, United States Bankruptcy Bankruptcy Judge for the District of Idaho, sitting by designation.

Based upon the Opinion filed concurrently herewith, Appellants' Sanctions motion filed on October 28, 2004 is hereby ORDERED DENIED.

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA,

NORTHERN DIVISION

In re: JAMES F. GEORGE, III and MARGIE R. GEORGE Debtors.	Case No. ND 94-12409 RR Adv. No. 02-1228 Chapter 7
JAMES F. GEORGE, III, and and MARGIE R. GEORGE Plaintiffs, v. CITY OF MORRO BAY Defendant.	**ORDER AFTER TRIAL** (Filed Jul 17, 2003) Trial Date: March 28, 2003 Time: 10:00 a.m. Place: 1415 State Street Room 201 Santa Barbara, CA 93101

On November 15, 2002, James F. George, III, and Margie R. George proceeding *pro se*, filed a complaint in this court (Adversarial Proceeding No 02-1228) Against the City of Morro Bay. The Complaint alleged that the City of Morro Bay had suspended, revoked, etc., a licence, charter, franchise, permit, or similar grant from the

plaintiffs "solely" because the plaintiffs were debtors in bankruptcy, thus discriminating against them and depriving them of property rights, in violation of Title 11, United States Code Section 525(a).

Trial in this matter was set for, and went forward on, March 28, 2003. Both Plaintiffs appeared, with Margie R. George arguing on behalf of herself and James F. George, III. The City of Morro Bay appeared by and through Peter E. Cummings of Hunt & Associates. Pursuant to Notice to Appear at Trial, Rick Algert, the Harbor Director for the City of Morro Bay, was present and prepared to testify if called to do so by plaintiffs.

The Court heard and considered the argument and evidence of the City, as presented by Peter E. Cummings. No witnesses were called by either side.

The Court took judicial notice of several documents presented by the City of Morro Bay, and admitted into evidence by the Court, including, but not limited to:

D. Case No ND 94-12409 RR, Order Granting Motion For Surrender Order and Denying Debtor's Motion to Assume Lease, entered February 1, 1995.

J. Case No ND 94-12409-RR, Adv. No. 96-1073, Order Granting Motion To Dismiss Complaint For Failure To State a Claim Upon Which Relief Can

Be Granted, entered November 12, 1996.

L. Case No. 97-56628, DC No. CV-97-10463-ER Published Opinion Of the United States Court of Appeals For the Ninth Circuit Filed May 24, 1999.

P. Case No. 01-56445, BAP NO. CC-00-01598-PMoBr, Published Order and Amended Opinion of the United States Court of Appeals For the Ninth Circuit Filed August 15, 2002, Amended March 6, 2003.

The Court also reviewed the trial briefs submitted by plaintiffs and defendants.

After considering the foregoing, the Court ruled against the plaintiffs. First, the Court found that the Complaint was barred by the Statute of Limitations. More specifically, the Court held that because the Complaint was based on an alleged violation of Title 1, United States Code Section 525(a), there is no controlling Federal Statute of Limitations period for this type of action, it was barred by the three year Statute of Limitations set forth in California Code of Civil Procedure Section 338(a), which governs statutory actions. The Court also held that the case was barred by California's one year Statute of Limitations for injury to person or property, because plaintiffs allege discrimination and the deprivation of property, pursuant to then existing California Code of Civil Procedure Section 340(3).

The Court also ruled, as a separate and additional basis for judgment, that the complaint was barred by the doctrine of collateral estoppel. The basis for this ruling is that numerous findings of fact and conclusions of law, upon which the court would need to find in favor of plaintiffs in the instant case, have already been actually litigated to a final decision in this court, and have already been affirmed on appeal as well.

It is therefore ordered that plaintiffs take nothing by way of their complaint, and judgment shall be entered against plaintiffs and in favor of defendant, City of Morro Bay.

Defendant City of Morro Bay shall recover its costs of suit.

IT IS SO ORDERED.

Dated: July 17, 2003

By: /s/ Robin Riblet
Honorable Robin Riblet
United States Bankruptcy Court
Central District of California

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA,

NORTHERN DIVISION

In re: JAMES F. GEORGE, III and MARGIE R. GEORGE Debtors.	Case No.: ND-94-12409 -RR Adv. No. 02-1228 Chapter 7
JAMES F. GEORGE, III, and MARGIE R. GEORGE, Plaintiffs, v. CITY OF MORRO BAY Defendant.	**ORDER REGARDING DEBTOR'S MOTION FOR NEW TRIAL** (Filed Jun. 17, 2004) Trial Date: March 28, 2003 Time: 10:00 a.m. Place: 1415 State Street Room 201 Santa Barbara, CA 93101

BACKGROUND

On November 15, 2002, James F. George, III, and Margie R. George proceeding *pro se*, filed a complaint in this court (Adversarial Proceeding No. 02-1228)

against the City of Morro Bay. The Complaint alleged that the City of Morro Bay had suspended, revoked, etc., a license, charter, franchise, permit, or similar grant from the plaintiffs "solely" because the plaintiffs were debtors in bankruptcy, thus discriminating against them and depriving them of property rights, in violation of Title 11, United States Code Section 525(a).

Trial in this matter was set for, and went forward on, March 28, 2003. Both Plaintiffs appeared, with Margie R. George arguing on behalf of herself and James F. George, III. The City of Morro Bay appeared by and trough Peter E. Cummings of Hunt & Associates. Pursuant to Notice to Appear at Trial, Rick Algert, the Harbor Director for the City of Morro Bay, was present and prepared to testify if called to do so by plaintiffs. The Court took judicial notice of several documents presented by the City of Morro Bay.

The Court heard and considered the argument and evidence of Plaintiffs, as presented by Margie R. George, and the argument and evidence of the City, as presented by Peter E. Cummings.

[as set forth on the record. /s/ RR[1]]

The court ruled ~~that the complaint was barred by the Statute of Limitations. The court also ruled that the complaint was barred by the doctrine of collateral estoppel.~~ The court then ordered that plaintiffs should take nothing, and that judgment shall be entered against plaintiffs and in favor of the City of Morro Bay. ~~The court also ordered that the City of Morro Bay should recover its costs.~~

MOTION FOR NEW TRIAL

Plaintiffs' Motion for a new trial was heard on October 7, 2003. Plaintiffs proceeded *pro se*. Both James F. George III and Margie R. George argued for the plaintiffs. Peter E. Cummings, Esq. appeared on behalf of the City of Morro Bay. Pursuant to subpoenas, the City produced David R. Hunt and Rick Algert as witnesses, but they did not testify. After hearing argument from both counsel, the court denied the motion for new trial. The basis for denying the motion is as follows:

A motion for a new trial in a non jury case must be heard on an error of law or a mistake of fact. It is the plaintiffs' burden to prove that such an

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[1] The Court lined through the portions of the Order (submitted by the City of Morro Bay) as shown and wrote in handwriting the words in the brackets above the stricken portions and initialed the changes in the margin.

error or mistake occurred, that it was a substantial error or mistake, and that the error or mistake was prejudicial. ~~Fed. R. Civ. P. 61; *Ckalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *Bernd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982)~~ Plaintiffs failed to meet their burden in every respect.[2]

In contrast, the court found that the Georges were simply attempting to re-litigate matters previously decided by the court, which is outside the scope of a new trial. ~~*In re Jones*, 112 B.R. (Bkrtcy. W.D. Mo. 1989), *Evans v. Tiffany & Co.*, 416 F. Supp. 224, 244 (D. Ill. 1976)~~.

Therefore, plaintiffs' motion for a new trial is denied.

IT IS SO ORDERED.

Dated: June 17, 2004

By: /s/ Robin Riblet
Honorable Robin Riblet
United States Bankruptcy Court
Central District of California

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[2] The Court lined through the portions as shown and wrote in the margin in her own handwriting "No cases were cited". She initialed each section /s/ RR.